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**In the Supreme Court of the United States**

**OCTOBER TERM, 1990**

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**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**FRED STANTON SMITH, ET AL.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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### **QUESTION PRESENTED**

Whether the trustee of a liquidating trust, appointed by the bankruptcy court to receive and dispose of the debtors' assets pursuant to a Chapter 11 plan of reorganization, is required to file federal income tax returns on behalf of the debtors and pay the taxes due.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (90-1361 Pet. App. 1a-16a)<sup>1</sup> is reported at 911 F.2d 1539. The opinion of the district court (Pet. App. 17a-27a) is

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<sup>1</sup> A petition for a writ of certiorari (No. 90-1361) in this same case was filed on February 28, 1991, by the debtors in the underlying bankruptcy proceeding. References to "Pet. App." in this petition are to the Appendix to that petition.

The parties to the proceedings in the court of appeals, in addition to the United States, were Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore B. Gould (collectively, the debtors), Fred Stanton Smith (the trustee) and Bank of New York (the bank).



unreported. The opinion of the bankruptcy court (Pet. App. 28a-37a) is reported at 85 Bankr. 898.

### JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. A petition for rehearing was denied on December 21, 1990 (Pet. App. 40a-41a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

1. Section 6012(b) of the Internal Revenue Code, as amended, provides in pertinent part:

#### A. Section 6012(b)(3):

In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

#### B. Section 6012(b)(4):

Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

2. Section 6151(a) of the Internal Revenue Code, as amended, provides:

Except as otherwise provided in this subchapter, when a return of tax is required under this

title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

### STATEMENT

1. Miami Center Limited Partnership obtained a construction loan from the Bank of New York (the bank) for the development of the Miami Center, a commercial real estate project in downtown Miami. Following default on this loan, the Miami Center Limited Partnership and the related Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould (the debtors) filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida. The cases were consolidated. Pet. App. 2a. On October 22, 1984, the bankruptcy court authorized the consummation of a pre-petition contract to sell parcels of real property in Washington, D.C. (the Washington properties), owned by Holywell Corporation. These sales were concluded in December 1984 and January 1985, generating proceeds of approximately \$32 million. Pet. App. 29a; *Holywell Corp. v. Bank of New York*, 59 Bankr. 340, 345 (S.D. Fla. 1986).

2. The debtors and the bank thereafter submitted competing plans of reorganization to the bankruptcy court. On August 8, 1985, the bankruptcy court confirmed an amended version of the bank's plan, over the debtors' objections. The district court affirmed the confirmation order. See *Holywell Corp. v. Bank*

of *New York*, 59 Bankr. at 353. The Eleventh Circuit subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the plan had been substantially consummated and no effective relief could be fashioned. See *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 cert. denied, 488 U.S. 823 (1988).<sup>2</sup> Pet. App. 2a-3a.

The plan, which was effective October 10, 1985, called for the transfer of essentially all of the debtors' assets (including the Miami Center and the proceeds from the sale of the Washington properties) to a liquidating trust.<sup>3</sup> See Pet. App. 42a-43a.

Article V of the Plan vests the liquidating trustee with all right, title and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. \* \* \*"

Pet. App. 14a.

Under the plan, the trustee of the liquidating trust was directed to enter into a contract with the bank for sale of the Miami Center. A sale price of \$255.6

<sup>2</sup> The government filed no objection to the confirmation of the plan and did not participate in the appeals of the confirmation order. Pet. App. 18a-19a.

<sup>3</sup> Article V of the plan provides that "[a] Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court \* \* \* is designated as Trustee of all property of the estates of the Debtors." Pet. App. 43a.

million was established, consisting of approximately \$16 million in cash and the cancellation of \$240 million of debt owed by the debtors to the bank. The net proceeds of the sale were to be paid into the liquidation trust, along with the proceeds from the sale of the Washington properties, for eventual distribution to creditors. Pet. App. 3a, 19a.

3. Although the gain on the sale of the Washington properties was realized during the fiscal year ending July 31, 1985, the corporate debtors did not file tax returns reporting the pre-confirmation sale income until January 4, 1988. At that time, the debtors requested the trustee (who then held the sale proceeds, along with the debtors' other assets) to pay the taxes owed. Pet. App. 19a.

Neither the corporate debtors nor the trustee filed federal income tax returns for any fiscal year ending after July 31, 1985. They thus never reported the gains realized from the sale of the Miami Center property. Nor did either the debtors or the trustee report the interest income derived by the trustee from reinvestment of the sales proceeds. Pet. App. 3a-4a. The taxes owed on the realized gains (in excess of \$75 million) from the sales of property, and on the interest income (in excess of \$8 million) earned on the proceeds of those sales, were thus neither reported nor paid by the debtors or the trustee. See 90-1361 Pet. 6 n.5.

4. Instead, on December 27, 1987, the trustee of the liquidating trust filed an adversary proceeding in the bankruptcy court seeking a declaration that the trustee was not obligated to file federal income tax returns or pay income tax on the gains realized from the sales of the Washington and Miami Center properties or the interest income received on the proceeds



of those sales.<sup>4</sup> Pet. App. 4a. The government contended that the trustee was required to file income tax returns on behalf of the debtors and to pay the tax due, pursuant to Sections 6012(b)(3) and (b)(4) and 6151(a) of the Internal Revenue Code (26 U.S.C.). Under Section 6012(b)(3), "a trustee in a case under title 11 of the United States Code," or "[an] assignee," having possession of or title to substantially all of the property of a corporate debtor, is required to file tax returns on behalf of the debtor. With respect to individual debtors, Section 6012(b)(4) similarly provides that the returns of a "trust" or an "estate of an individual under chapter 7 or 11 of title 11 of the United States Code" shall be filed by the "fiduciary thereof." Section 6151(a) then further provides that the person required to make such a return of tax "shall pay such tax."

The bankruptcy court held, however, that the trustee was not responsible for filing federal income tax returns on behalf of the debtors and therefore was not responsible for paying the federal income taxes due. The court held that the liquidating trustee was not a "trustee in a case under title 11" within the meaning of Section 6012(b)(3), but rather "a creature of a contract, \* \* \* a contract trustee." Pet. App. 32a. The court further held that the trustee was neither an "assignee" under Section 6012(b)(3), nor a "fiduciary" under Section 6012(b)(4), reasoning that the trustee's duties and powers were limited to the disposition of the debtors' assets and were thus analogous to those of a "disbursing agent." Pet. App.

<sup>4</sup> No determination of the tax liability of any party had then been made by the IRS with respect to such gains and investment income, although the taxes would evidently be substantial.

32a-33a. The court concluded that the debtors, and not the trustee, were responsible for the reporting and payment of any taxes due on the realized gains and interest income, notwithstanding that all of the assets from which such payment could be made had been transferred from the debtors to the trust. Pet. App. 31a-34a. The district court adopted the reasoning of the bankruptcy court and affirmed its ruling. Pet. App. 17a-27a.

5. In a split decision, the Eleventh Circuit affirmed. The court of appeals held that "[b]y its terms" (Pet. App. 11a), Section 6012(b)(3)—which requires a "trustee in a case under title 11 of the United States Code" to file returns—"refers only to trustees who are appointed under chapter 11 of the Bankruptcy Code." Pet. App. 11a. The majority concluded that the liquidating trustee, who had been appointed by the bankruptcy court in this case, was not a trustee in a case under Title 11, "but rather a contract trustee performing limited and essentially ministerial duties." *Ibid.* The majority further concluded that "the liquidating trustee's nondiscretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary." Pet. App. 11a-12a. The majority suggested that its "conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes." Pet. App. 9a-10a.

In dissent, Judge Cox noted that the majority had misread the plain words of the applicable statute. Section 6012(b)(3) applies to all trustees "in a case under Title 11 of the United States Code" and not simply to trustees "appointed under Chapter 11."



Pet. App. 13a. The majority's effort to distinguish a "contract trustee" appointed by the bankruptcy court (Pet. App. 11a) from a "trustee in a case under title 11" simply "fails to comport with the broad wording of the statute." Pet. App. 13a. It also is inconsistent with the legislative history of the statute, which reveals a congressional intent "to reach a broad spectrum of persons acting in a fiduciary capacity for a corporation in a bankruptcy." Pet. App. 14a (citing H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954) and S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954)). Judge Cox concluded that:

[S]ection 6012(b)(3) anticipates any situation where substantially all of the assets of a corporation are vested in a person acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

Pet. App. 14a.

#### REASONS FOR GRANTING THE PETITION

The decision in this case threatens to create a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. In reaching this result, the court of appeals ignored the plain language and evident purpose of the statutory provisions that have been enacted by Congress specifically to ensure that such a loophole would *not* exist. By establishing the hitherto unheard-of category of "contract trustee," and making such "contract trustee" exempt from the

tax reporting and payment obligations of all other trustees, fiduciaries and assignees in cases under Title 11, the decision of the court of appeals conflicts with the decisions of other circuits.

1. Statutes that are designed to "protect[] the public revenues" from evasion through corporate reorganization or insolvency should "be liberally construed to achieve this broad purpose." *United States v. Key*, 397 U.S. 322, 324 (1970). See also *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 487 (1926). Congress has long manifested its intent that income accruing to the debtor's estate in bankruptcy is not to escape taxation.

Section 6012(b)(3), which evolved from the Revenue Act of 1916, ch. 463, § 13(c), 39 Stat. 756 (*Northwest Utils. Sec. Corp. v. Helvering*, 67 F.2d 619, 621 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934); *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir.), certs. denied, 322 U.S. 754 and 755 (1944)), requires a "receiver, trustee in a case under title 11 of the United States Code, or assignee," who obtains possession or holds title to "all or substantially all the property \* \* \* of a corporation" to file the income tax return for that corporation.<sup>5</sup> The statute emphasizes the breadth of its com-

<sup>5</sup> Similarly, Section 6012(b)(4), which applies to the estates of individuals, provides that the "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of Title 11 of the United States Code shall be made by the fiduciary thereof." The liquidating trustee in an individual bankruptcy is a "fiduciary" within the scope of this statute and must file a tax return and pay taxes on income realized in the liquidation. *In re Joplin*, 882 F.2d 1507, 1510 (10th Cir. 1989). Under Section 1398 of the Internal Revenue Code, a separate taxable entity, the estate of the individual debtor, came into existence when Mr. Gould filed for bankruptcy. The situation is different for the corporate debtors. Under

mand by stressing that the "receiver," "trustee," or "assignee" has this obligation whether he comes into possession of the corporation's assets "by order of a court \* \* \*, by operation of law or otherwise." 26 U.S.C. 6012(b)(3) (emphasis added). Section 6051(a) then further requires that the taxes due on the return be paid by the person who filed the return. In this manner, Congress has ensured that the duty to report and pay taxes will follow the assets from which the income is realized and from which the tax payment is to be made.

In accordance with Congress's broad objective to ensure the reporting and payment of taxes on income earned on corporate assets held in others' hands, courts have applied Section 6012(b)(3) and its predecessors to "the assignee of corporate property, engaged in its orderly liquidation" (*Louisville Property Co. v. Commissioner*, 140 F.2d at 547), to the sales of real estate by a "trustee (of a corporation) in dissolution for the benefit of creditors" (*United States v. Loo*, 248 F.2d 765, 768 (9th Cir. 1957), cert. denied, 356 U.S. 928 (1958)), to sales of real estate by a trustee in a bankruptcy "liquidation" of the corporation (*United States v. Sampsell*, 266 F.2d 631, 633 (9th Cir. 1959)), and to the realization of gains from the sale of corporate assets and the receipt of "passive income from interest" by a "non-operating trustee" in a bankruptcy liquidation (*In re Sapphire S.S. Lines*, 762 F.2d 13, 14-15 (2d Cir. 1985), accord *In re Bentley*, 916 F.2d 431, 432 (8th Cir. 1990)). Affording the statute a construction consistent with

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Section 1399 of the Internal Revenue Code, no new taxable entity arose by virtue of their filing bankruptcy petitions, and the return to be made by the trustee under Section 6012(b)(3) is "for such corporation." 26 U.S.C. 6012(b)(3).

its comprehensive text and evident purpose, the Third Circuit held that a trustee appointed by the court to liquidate an estate in bankruptcy was subject to the tax reporting and payment obligations of Sections 6012(b)(3) and 6051(a):

[W]e think that a fair reading of the pertinent sections of the Internal Revenue Code renders the non-operating trustee of a bankrupt corporation liable for the payment of taxes on the bankrupt's income, provided the trustee has possession of, or title to, substantially all the bankrupt's property.

*In re I.J. Knight Realty Corp.*, 501 F.2d 62, 66 (3d Cir. 1974).

The legislative history and derivation of Section 6012(b)(3) support the conclusion that the statute should be applied as broadly as its language indicates. The predecessor of Section 6012(b)(3), Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 771, provided, in pertinent part, that "receivers, trustees in bankruptcy, or assignees \* \* \* operating the property or business of corporations \* \* \* shall make returns \* \* \* for such corporations." Treasury Regulations promulgated in 1918 under the first reenactment of this provision (Revenue Act of 1918, ch. 18, § 239, 40 Stat. 1081) construed the phrase "receivers, trustees in bankruptcy, and assignees" to include "trustees in dissolution." Treas. Reg. 45, Art. 622 (1918 Revenue Act). The decisions uniformly supported this interpretation. See, e.g., *Northwest Utils. Sec. Corp. v. Helvering*, 67 F.2d 619, 620 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933). In enacting the 1954 Code, Congress confirmed that the phrase "receiver, trustee in



bankruptcy, or assignee" was intended to include any "fiduciary" acting on behalf of a corporation. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954).<sup>6</sup>

2. The decision of the court of appeals in this case creates an artificial category, described as "contract trustees," which the court exempts from the tax reporting and payment obligations of Sections 6012(b) and 6051(a). There is no precedent for such a category; indeed, the term "contract trustee" appears not to have been used before in any context in any decision ever issued by a federal court.<sup>7</sup> Moreover, as the facts of this case demonstrate, an exemption afforded to a "contract trustee" creates the very evil that the statute is designed to avoid.

a. On the effective date of the reorganization plan, essentially all of the debtors' assets passed to the liquidating trustee who had been appointed by the bankruptcy court. These assets included the proceeds of the pre-confirmation sale of the Washington properties and the Miami properties which, shortly thereafter, were sold by the liquidating trustee at a sub-

<sup>6</sup> The Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(i), 94 Stat. 3389, modified the language of the statute by substituting the words "trustee in a case under title 11 of the United States Code" for "trustee in bankruptcy." The legislative history makes clear that the change was intended only to "substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. No. 1035, 96th Cong., 2d Sess. 52-53 (1980).

<sup>7</sup> This statement is based upon a computer word search for the term "contract trustee" through the entire body of reported federal decisions.

stantial gain.<sup>8</sup> The court of appeals ruled that the liquidating trustee, who holds the proceeds of these sales and the interest income derived from the investment of those proceeds, is not required to report that income or to pay any tax that might be due. Instead, the court has assigned those responsibilities to the debtors, who, because of the transfer of their assets to the liquidating trustee, evidently lack funds to satisfy the tax liabilities resulting from the income received by the trustee.<sup>9</sup>

This shifting of the tax burden to the insolvent debtor for the income realized by the trustee would, as a practical matter, allow the taxes to escape payment. See Pet. App. 16a (Cox, J., dissenting). The comprehensively worded and broadly intended mission of Section 6012(b)(3)—to capture and tax income received into the hands of the "receiver," "trustee"

<sup>8</sup> The Washington properties were sold before the liquidating trustee was appointed. But the returns of the corporate debtors for the taxable year during which the Washington properties were sold (ending July 31, 1985) were not due until October 15, 1985. 26 U.S.C. 6072(b). On October 10, 1985, the trustee was vested with the corporate assets unreduced by the tax liabilities required to be accounted for on the 1985 returns. The return filing obligations of the trustee thus extend to the 1985 taxable year (including the Washington property sale) as well as later years. See *Nicholas v. United States*, 384 U.S. 678, 692-693 (1966).

<sup>9</sup> By contrast, in *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), the court of appeals specifically rejected the suggestion that the insolvent debtor, rather than his liquidating trustee, should be responsible for taxes on gains realized and interest income received by the trustee. *Id.* at 432. In reaching this conclusion, the court noted that (*id.* at 433):

a contrary holding would have the effect of burdening the debtor's fresh start under the bankruptcy law. See also *Grozen v. Gardner*, 111 S. Ct. 654, 659 (1991).

or "assignee" who holds "substantially all of the assets" of the corporation—would thus quite plainly be defeated.

b. The rationale of the court of appeals is that the liquidating trustee appointed by the bankruptcy court in this case was neither "a trustee in a case under title 11," an "assignee" nor a "fiduciary," but was instead a "contract trustee" or "disbursing agent." Pet. App. 11a-12a. In so holding, the court of appeals drew arbitrary and unsupported distinctions that are inconsistent with the plain meaning of the words of the statute and its legislative purpose.

(i) The court of appeals' holding that the trustee is "not a trustee in a case under title 11" cannot be reconciled with the broad language of the statute. The liquidating trust was created pursuant to a plan confirmed under Title 11 (11 U.S.C. 1129); the trustee was then appointed by a court that drew its jurisdiction from Title 11 (11 U.S.C. 105); and jurisdiction existed in the bankruptcy court to resolve this adversary proceeding solely under Title 11 (11 U.S.C. 505(a)).<sup>10</sup> Given that Title 11 is the sole source of authority for the bankruptcy court to direct the disposition of the property of the debtors in this case, it is difficult to comprehend how the liquidating trustee appointed by the bankruptcy court could be anything other than a "trustee in a case under title 11."<sup>11</sup>

<sup>10</sup> 28 U.S.C. 2201 (a), which prohibits declaratory judgments "with respect to Federal taxes," contains an exception for "a proceeding under Section 505 \* \* \* of Title 11." *Ibid.*

<sup>11</sup> Indeed, at other points in this proceeding, the trustee has asserted that he is "a trustee acting in a case under title 11" within the meaning of an exception to the insolvency provisions of 31 U.S.C. 3713. See 3 C.A. App., Doc. 21, at 35. Sec-

The court of appeals apparently was of the view that the phrase "trustee in a case under title 11 of the United States Code," refers only to trustees appointed under a single section of the Bankruptcy Code (11 U.S.C. 1104(a)) which deals with trustees appointed in a Chapter 11 reorganization. See Pet. App. 11a. By its terms, however, Section 6012(b)(3) refers not to any single bankruptcy provision, but instead generically to all trustees appointed "in a case under title 11." The latter phrase necessarily encompasses the liquidating trustee in this case, whose authority derives from that of the bankruptcy court "in a case under title 11."

The court of appeals attempted to justify its exemption for "contract trustees" on the theory that the liquidating trustee was appointed to perform "limited and essentially ministerial duties" (Pet. App. 11a). This characterization is without legal significance and is, in any event, incorrect. The duties of the liquidating trustee include the responsibility to hold, sell and invest assets, receive the income from those assets, enter into contracts, incur and pay expenses, and, ultimately, to make distributions in accordance with the confirmed plan. See Pet. App. 42a-46a. As Judge Cox stated in dissent, to describe these duties as "ministerial"

denies the reality of [the trustee's] rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."

tion 3713(a)(1) gives first priority to claims of the United States if a person is insolvent. Section 3713(a)(2), invoked by the trustee, provides an exception to this rule for "a case under title 11." 31 U.S.C. 3713(a)(2).



Pet. App. 14a-15a. See also *In re I.J. Knight Realty Corp.*, 501 F.2d at 66 (applying Section 6012(b)(3) to a liquidating trustee). Accord, *In re Bentley*, 916 F.2d at 431-432.

(ii) The liquidating trustee also functioned as an "assignee" or "receiver" within the meaning of Section 6012(b)(3). An assignee is "one to whom an assignment is made," or "one to whom a right of property is legally transferred." *Webster's Third New International Dictionary* 132 (1986). The term "receiver" has been defined as "embracing any person acting as an agent or depository of funds for the court." *Spring Valley Water Co. v. San Francisco*, 246 U.S. 391, 395 (1918). Both of these terms accurately describe the liquidating trustee in this case, who was vested with all right, title, and interest of the debtors in their property and who was empowered to administer the liquidation of that property pursuant to the reorganization plan. Internal revenue regulations have long provided that the return filing requirement applies to receivers "engaged in \* \* \* marshaling, selling, and disposing of [a corporation's] assets for purposes of liquidation." Treas. Reg. 118, § 39.52.2 (1939 Code). See also *Pinkerton v. United States*, 170 F.2d 846, 847-848 (7th Cir. 1948) (applying statute to "liquidating receiver"); Treas. Reg. § 1.6012-3(b)(4) (applying statute to a "trustee in dissolution"). As this Court stated in a similar context in *Spring Valley Water Co. v. San Francisco*, 246 U.S. at 395, "[t]o give the word ['receiver'] the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute."<sup>12</sup>

<sup>12</sup> We do not intend to suggest that the liquidating trustee was appointed as a "receiver." See 11 U.S.C. 105(b) (bank-

(iii) Also erroneous is the court of appeals' holding (Pet. 12a) that the trustee was not a "fiduciary" of the estate of an individual debtor within the meaning of Section 6012(b)(4), which requires that the "[r]eturns of \* \* \* an estate of an individual debtor under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." The court of appeals reasoned that the trustee was not a "fiduciary" because his duty to identify and pay allowed claims in accordance with the terms of the plan was akin to that of a "disbursing agent."<sup>13</sup> Pet. App. 12a. A "disbursing agent," however, could not be said to have the power, granted to the liquidating trustee in this case, to sell, encumber or invest property and to deal with property "in all \* \* \* ways as would be lawful for any person owning the same to deal therewith." Pet. App. 45a-46a. The term "fiduciary" is defined broadly in Section 7701(a)(6) of

ruptcy court is not to appoint receivers). Our point is that the scope of Section 6012(b)(3) is sufficiently broad that the term "receiver" in that statute encompasses the function performed by the liquidating trustee in this case.

<sup>13</sup> The sole decision relied on by the court of appeals for this proposition was *In re Alan Wood Steel Corp.*, 7 Bankr. 697 (E.D. Pa. 1980). In *Alan Wood*, a disbursing agent was appointed to hold specific funds under the plan of reorganization in escrow until certain doubtful claims were resolved, and then to make distribution accordingly. *Id.* at 699-701. The district court held that Section 6012(b)(3) was not applicable in that case because "a disbursing agent does not have possession of or hold title to substantially all the business or property of the debtor corporation." 7 Bankr. at 701. In the present case, by contrast, the liquidating trustee was appointed trustee of "all property of the estates of the debtors" under the Bankruptcy Code. Pet. App. 43a. The trustee in this case was also given substantial powers to manage, encumber and dispose of all such property. Pet. App. 43a-46a.

the Internal Revenue Code as a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity."<sup>14</sup> This definition encompasses the liquidating trustee who was appointed, and given broad powers, by the bankruptcy court in this case. See *In re Joplin*, 882 F.2d at 1510 (liquidating trustee is a "fiduciary" required to report taxes under Section 6012(b)(4)).

3. The decision in this case conflicts with the decisions of other courts of appeals. Other courts have applied the tax reporting and payment provisions of Sections 6012(b) and 6051(a) not only to liquidating trustees in bankruptcy cases (*In re Joplin*, 882 F.2d at 1510; *In re I.J. Knight Realty Corp.*, 501 F.2d at 66; *United States v. Sampsell*, 266 F.2d at 633), but also to other fiduciaries travelling under a variety of titles. Assignees for benefit of creditors, trustees in dissolution, receivers, liquidating trustees—whose common characteristic is that they possess the property of a taxpayer for purposes of liquidation and distribution—have all been held to come within the broad sweep of Section 6012(b) or its predecessors. They have thus all been held responsible for filing returns and paying taxes on the taxpayer's behalf. See *Hersloff v. United States*, 310 F.2d 947 (Ct. Cl. 1962), cert. denied, 373 U.S. 923 (1963); *United States v. Loo*, 248 F.2d at 768; *Louisville Property Co. v. Commissioner*, 140 F.2d at 547; *Kavanagh v. First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943); *First Nat'l Bank v. United States*, 86 F.2d 938

<sup>14</sup> See also Treas. Reg. § 301.7701-6 (26 C.F.R.) ("A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers.").

(10th Cir. 1936); *Northwest Utils. Sec. Corp. v. Helvering*, 67 F.2d at 621. In this manner, the courts have ensured that the underlying purpose of these statutes has been achieved, and that tax obligations have been borne and fulfilled by the fiduciary who possesses the assets that generated the income.

The court of appeals in this case departed from these uniform and long-standing decisions by affording controlling significance to a label designated as "contract trustee." This novel term, which has no history in the law, does not even accurately denote the source of the trustee's authority, which is derived wholly from court order. Aside from pointing out that Congress (quite understandably) did not specifically list "contract trustees" among the persons who are responsible for filing returns under Section 6012(b) (Pet. App. 11a), the court did not explain why a liquidating trustee appointed in a case under Title 11 should be treated differently from any other trustee, receiver, assignee or fiduciary liquidating the property of a corporate or individual taxpayer.

4. The use of liquidating trusts and similar devices as a means for reorganizing a debtor's estate within Chapter 11 of the Bankruptcy Code has become increasingly popular in recent years. See Anderson & Wright, *Liquidating Plans of Reorganization*, 56 Am. Bankr. L.J. 29 (1982). If the decision in this case is allowed to stand, the popularity of such liquidating trusts can be expected to surge beyond all expectations: by immunizing such entities from federal income tax liability for capital gains and investment income, the ruling in this case would enable creditors to receive the windfall of a distribution of the debtor's assets swollen by unpaid tax funds. Such distortion of the proper uses of the Bankruptcy Code

would result in losses to the public fisc of substantial proportions.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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